# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK E. EALEY,

Appellant,

VS

No. 21520

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the Western District of Washington
Northern Division
Honorable William T. Beeks
District Judge

FILED

MAY 25 1967

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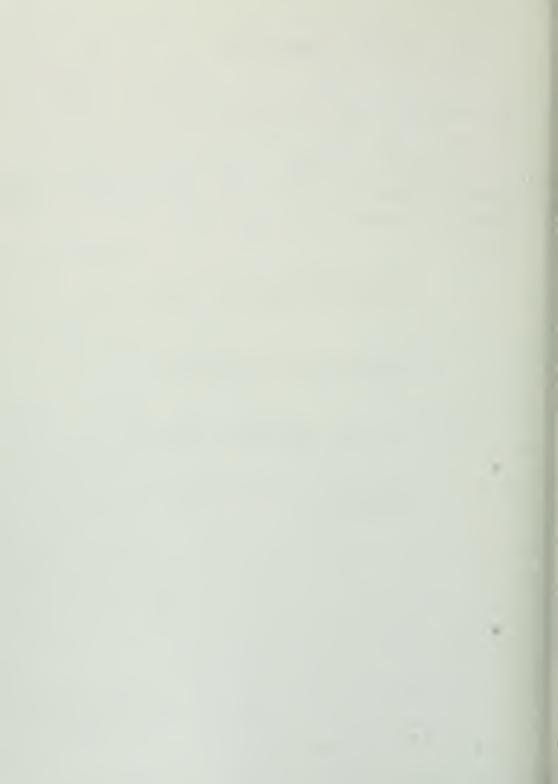
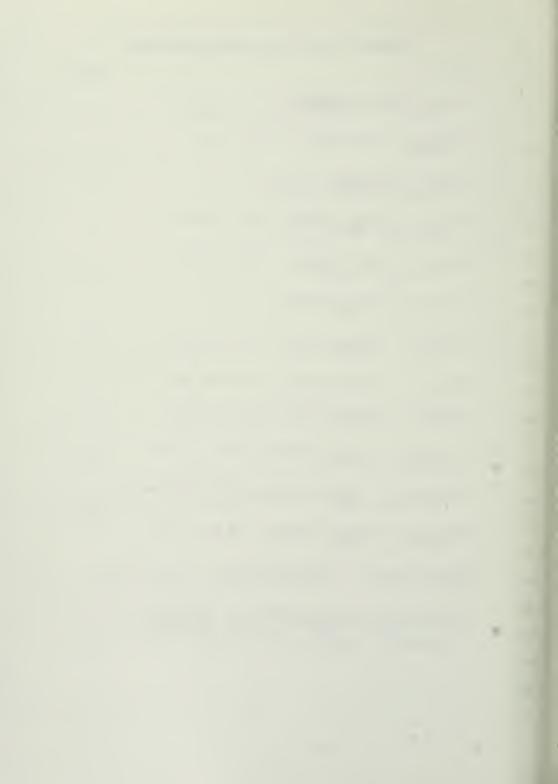


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# STATEMENT OF JURISDICTION

Appellant was charged in a six-count Indictment with violation of the Federal Narcotics Laws. Said Indictment is set forth as follows (Ct. 1):

#### COUNT I

That on or about December 16, 1965, at Seattle, Washington, within the Northern Division of the Western District of Washington, FRANK E. EALEY did knowingly and unlawfully conceal and sell a quantity of narcotic drugs, to wit, approximately 30.773 grams of heroin hydrochloride, knowing the same to have been imported into the United States contrary to law.

All in violation of 21 U.S.C. 174.

#### COUNT II

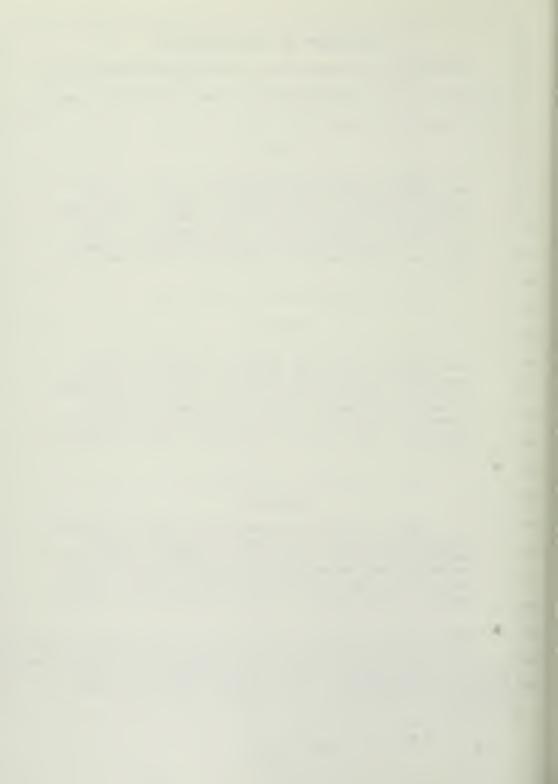
That on or about January 13, 1966, at Seattle, Washington, within the Northern Division of the Western District of Washington, FRANK E. EALEY did knowingly and unlawfully conceal and sell a quantity of narcotic drugs, to wit, approximately 66.921 grams of heroin hydrochloride, knowing the same to have been imported into the United States contrary to law.

All in violation of 21 U.S.C. 174.

#### COUNT III

That on or about December 16, 1965, at Seattle, Washington, within the Northern Division of the Western District of Washington, FRANK E. EALEY did knowingly and unlawfully sell, disperse and distribute a quantity of narcotic drugs, to wit, approximately 30.773 grams of heroin hydrochloride, not in

In this brief (Ct.) will refer to the number of the records herein given by the Clerk of the Court for the Western District of Washington. (Tr.) will refer to the Court Reporter's transcript of proceedings. (Ex.) will refer to exhibits.



or from the original stamped package.

All in violation of Title 26, U.S.C., Section 4704(a).

#### COUNT IV

That on or about January 13, 1966, at Seattle, Washington, within the Northern Division of the Western District of Washington, FRANK E. EALEY did knowingly and unlawfully sell, disperse and distribute a quantity of narcotic drugs, to wit, approximately 66.921 grams of heroin hydrochloride, not in or from the original stamped package.

All in violation of Title 26 U.S.C., Section 4704(a).

#### COUNT V

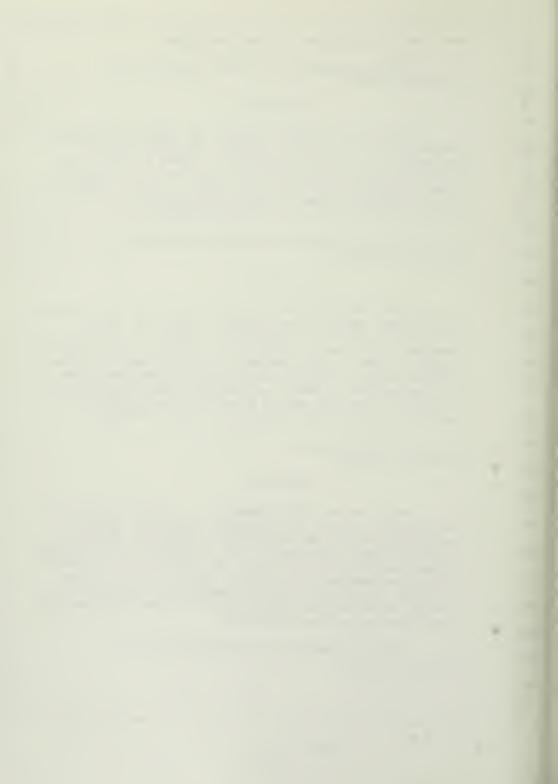
That on or about December 16, 1965, at Seattle, Washington, within the Northern Division of the Western District of Washington, FRANK E. EALEY did knowingly and unlawfully sell a quantity of narcotic drugs, to wit, approximately 30.773 grams of heroin hydrochloride, not in pursuance of a written order of the person to whom such heroin hydrochloride was sold on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate.

All in violation of Title 26, U.S.C., Section 4705(a).

#### COUNT VI

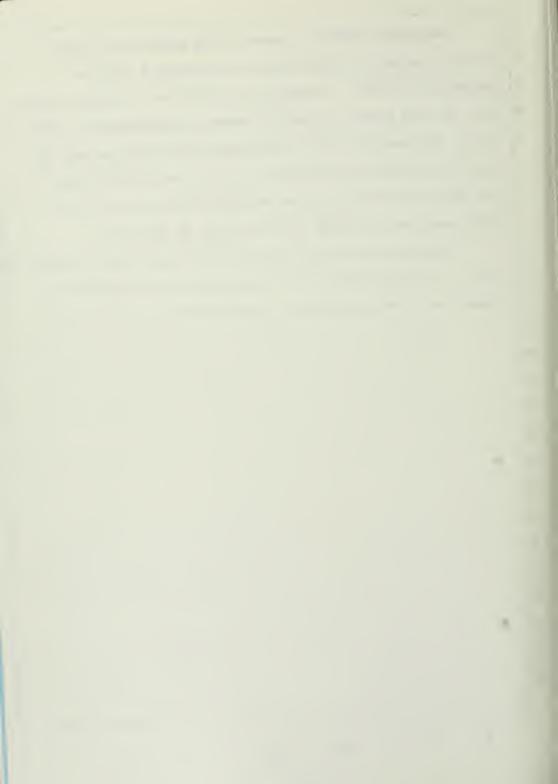
That on or about January 13, 1966, at Seattle, Washington, within the Northern Division of the Western District of Washington, FRANK E. EALEY did knowingly and unlawfully sell a quantity of narcotic drugs, to wit, 66.921 grams of heroin hydrochloride, not in pursuance to a written order of the person to whom such heroin hydrochloride was sold on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate.

All in violation of Title 26, U.S.C., Section 4705(a).



Defendant entered a plea of not guilty as to each count on August 17, 1966, and was tried by a jury on September 6, 1966. A verdict of guilty was returned by the jury on each count of the Indictment on September 6, 1966, and on October 28, 1966, the Judgment and Sentence was pronounced and imposed on Counts I, II, V and VI (Ct. 10). The defendant was acquitted on Counts III and IV of the Indictment on a finding of not guilty by the Court.

Jurisdiction of the District Court was based on Title 18 U.S.C., Section 3231. This Court has jurisdiction of the appeal under Title 28 U.S.C., Section 1291.



## COUNTERSTATEMENT OF THE CASE

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The testimony taken at the trial established the following: The Seattle office of the Federal Bureau of Narcotics suspected Frank Ealey of engaging in narcotic sales in the Seattle area and commenced an investigation of his activities in October of 1965 (Tr. 6,7). Joseph Gordon, a King County Deputy Sheriff, was loaned to the Federal Bureau of Narcotics as an undercover agent (Tr. 30) and met the defendant Frank Ealey on December 7, 1965 (Tr. 31). Arrangements were made at that time for Gordon to purchase narcotics from Ealey in the future (Tr. 32). On December 16, 1965, Deputy Sheriff Gordon was furnished with \$500.00 of official Government advance funds (Tr. 34) and met with defendant Ealey at the Lin-Villa Motel in Seattle (Tr. 36) where Gordon paid Ealey \$350.00 for narcotics (Tr. 39). Ealey pointed to a paper sack located in a tree just outside the door of his unit at the Lin-Villa Motel and Deputy Gordon retreived the paper sack which contained a white substance (Tr. 39) which later proved to be 30.7 grams of heroin hydrochloride (Tr. 96-97). On January 13, 1966, Narcotics Agent Joseph Ferro furnished Deputy Gordon with \$1,100.00 of official Govert ment advance funds with which to purchase narcotics from defendant Frank Ealey (Tr. 47-48). Deputy Gordon, on that date, met Ealey at an apartment house located at 2801 Yesler Way where Ealey sold to Gordon a rubber container with white



powder therein for \$1,050.00 (Tr. 51). The white powder contained inside said container proved to be 66.9 grams of heroin hydrochloride (Tr. 98-99).

The testimony of Deputy Gordon was corroborated by Agent Joseph Ferro (Tr. 5-27) and by Narcotics Agent Aubrey Abbey (Tr. 74-93). Deputy Gordon further testified that he was not registered with anyone to purchase narcotics except in the course of his official duties (Tr. 57 and 58).

At the close of the Government's case, defense counsel moved for a mistrial and for a judgment of acquittal on all six counts (Tr. 104-108). The Court denied the motion for a mistrial and denied the motion for a judgment of acquittal as to Counts I, II, V and VI, while reserving ruling on the motion for judgment of acquittal on Counts III and IV (Tr. 108). The defendant then took the witness stand. When the defense rested (Tr. 121) the defense failed to renew its motion for a judgment of acquittal on all counts (Tr. 121-124). After the Court had instructed the jury and had allowed the jury to retire to the jury room, the defense then renewed its motion for judgment of acquittal as to Counts III and IV only (Tr. 143).

## QUESTIONS PRESENTED

- 1. Counts III and IV
- (a) Whether defense requested its motion for a judgment of acquittal in a timely manner.



(b) Whether a Trial Court has the authority to reserve ruling on a motion for acquittal and submit the issue to the jury.

- 2. Whether the Trial Court committed prejudicial error by submitting Counts V and VI to the jury.
- 3. Whether the defendant's acquittal on Counts III and IV forecloses conviction on Counts I and II.
  - 4. Whether there were any grounds for a mistrial.

## SUMMARY OF ARGUMENT

- 1. (a). Defendant did not make a motion for judgment of acquittal at the close of all testimony; hence, the sufficiency of the evidence on Counts III and IV is not subject to review at this time.
- (b). A Trial Court has the authority to reserve its ruling on a motion for acquittal if the motion is made at the close of all the evidence and to submit the issue to the jury.
- 2. The sufficiency of the evidence on Counts V and VI is not subject to review at this time because no motion for acquittal was made at the close of all the evidence.
- 3. The evidence is sufficient to warrant conviction on Counts I and II.
- 4. No grounds for mistrial were cited in appellant's brief.



A TRIAL COURT HAS THE DISCRETION TO RESERVE RULING ON A MOTION FOR ACQUITTAL AND SUBMIT THE ISSUE TO THE JURY

The record reveals that the trial court instructed the jury as to the law on each of the six counts contained in the Indictment, (TR 125-143) after which the jury returned a verdict of guilty on all six counts. Thereafter, at the time of sentencing, the trial court reversed the jury verdict as to Counts III and IV and entered a judgment of acquittal on said counts. Appellant charges that the trial court followed incorrect procedure and does not, within its discretion, have the right to reserve its ruling on counts such as III and IV.

Rule 29 of the Federal Rules of Criminal Procedure specifically authorizes the Court to reserve decision when a motion for judgment of acquittal has been made:

(b) Reservation of decision on motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns the verdict or after it returns a verdict of guilty or is discharged without having returned a verdict... [emphass supplied]

This provision has been upheld in <u>Jackson</u> v. <u>United States</u>, 250 F.2d 897 (5th Cir. 1958) at page 901:



rel Hetenyi v. Wilkens, 384 F.2d 844 (2nd Cir. 1965), cert. den.

Mancusi v. Hetenyi, 383 U.S. 913. Government counsel cannot



Appellant further contends there was not any evidence presented indicating that the defendant knowingly sold a quantity of narcotics "not in or from the original package" and therefore, the issue should not have gone to the jury.

Appellant cites Epstein v. United States, 174 F.2d 754 (6th Cir. 1949), which case is not in point. The narcotic drugs themselves, Government's Exhibits 1 and 2, were admitted into evidence (TR 97 and 99) and were available to the jury for examination during their deliberation. Surely the jury could examine in the jury room the drugs and the propholactic in which they were contained, and note that no revenue stamp was affixed thereto. Title 26, United States Code, Section 4704(a) provides in part as follows:

...the absence of appropriate tax paid stamps from narcotic drugs shall be prima <u>facie</u> evidence of a violation of this subsection by the person in whose possession the same may be found.



The court instructed the jury as to this statutory provision in the following language:

With regard to Counts III and IV, the absence of appropriate tax paid stamps from the heroin hydrochloride is prima facie evidence of a violation of the applicable law by the person in whose possession they may be found. (TR 133)

Hence, there was more than a scintilla of evidence presented and the court could properly allow issues III and IV to go to the jury.

In summary, a trial judge has the discretion to reserve ruling on a motion for acquittal, and to submit the issue to the jury. By so doing, the defendant in this case was not prejudiced by the court's procedure, especially when the record herein shows that the defendant was ultimately acquitted on Counts III and IV of the Indictment.

II

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY SUBMITTING COUNTS V AND VI TO THE JURY

Appellant attacks the sufficiency of the evidence regarding Counts V and VI of the Indictment and alleges that said counts should not have been submitted to the jury. The Government contends that appellant did not move for a judgment of acquittal on Counts V and VI at the time required by law. Page 104 and 105 of the transcript reveal that appellant



moved for a judgment of acquittal on all counts of the Indictment at the close of the Government's case. At page 108 the court denied appellant's motion for a mistrial and also denied motion for judgment of acquittal on Counts I, II, V and VI. The appellant, Frank Ealey, then took the stand and after he had testified, the defense rested. (TR 121) No motions for judgment of acquittal as to Counts V or VI were made at the conclusion of the evidence, or at any time thereafter (TR 121-124). Hence, the appellant is unable to question the sufficiency of the evidence as to Counts V and VI on this appeal.

It is well stated in <u>Picciurro</u> v. <u>United States</u>, 250 F.2d 585 (8th Cir. 1958) at page 589:

In order to entitle a defendant to question the sufficiency of the evidence he must first have presented the question to the trial court by motion for judgment of acquittal interposed at close of all the testimony, thus raising a question of law which this court will consider on appeal, and it is well settled that absent such motion this court will not review the evidence. 7th Amendment, U.S. Constitution; (Cases cited). [emphasis added]

The <u>Picciurro</u> case is identical to the one in question in that defense counsel at the close of the Government's evidence moved for judgment of acquittal which motion was



denied. The defendant failed to renew his motion at the close of all evidence, and the court therefore refused to review the evidence on appeal. See also Rosenbloom v.

United States, 259 F.2d 500 (8th Cir. 1958); Costner v.

United States, (6th Cir. 1959). The rational is stated in Corbin v. United States, 253 F.2d 646 (10th Cir. 1958)

at page 647:

At the conclusion of the Government's case, Corbin demurred to the evidence and moved for a directed verdict. After adverse ruling by the court thereon, he presented evidence in defense of the charges. By this action he waived any objection he may have had to such rulings. At the conclusion of their presentation of evidence, Corbin made no motion for a judgment of acquittal or any other motion attacking the sufficiency of the evidence. [emphasis supplied]

Hence, the general rule is that a Federal appellate court will not pass upon the sufficiency of the evidence to support a verdict in the absence of a motion for a judgment of acquittal interposed at the close of all testimony.

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In summary, since appellant failed to move for a judgment of acquittal on Counts V and VI at the close of all testimony, the sufficiency of the evidence on said counts is not subject to review at this time. This argument also applies to Counts III and IV, discussed supra in Argument I inasmuch as appellant did not move for a judgment of acquittal on those counts at the close of the testimony.

#### III

DEFENDANT'S ACQUITTAL ON COUNTS III AND IV
DOES NOT FORECLOSE CONVICTION ON COUNTS I AND II

Appellant contends that acquittal on Counts III and IV prevent a conviction on Counts I and II because 21 U.S.C., 174 and 26 U.S.C., 4704(a) each require the knowing sale of a quantity of contraband. The Government contends that such an allegation presents a frivolous defense.

Both 21 U.S.C. 174 and 26 U.S.C. 4704(a) require as an element of proof testimony showing the sale of a narcotic drug. The evidence in this case proving sale is overwhelming, consisting of direct testimony from the King County Deputy Sheriff, Joseph Gordon, that he actually purchased heroin hydrochloride from the defendant Ealey on December 16, 1965 and January 13, 1966. His testimony is corroborated by that of Narcotic Agent Joseph Ferro and Narcotic Agent Aubrey Abby. The second element of proof necessary to sustain a



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conviction under 21 U.S.C. Section 174 is that the defendant knew the narcotic drug was imported or brought into the United States contrary to law. Since it is often difficult to trace the course of travel of a quantity of narcotic drugs, 21 U.S.( 174 contains a presumption that unexplained possession of a narcotic drug is deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. The testimony of King County Deputy Sheriff, Joseph Gordon, amply shows that the defendant did in fact have possession of the narcotic drug on the dates charged in the Indictment, and the defendant did not explain said possession. This presumption has held valid by the Court of Appeals for the Ninth Circuit in Brown v. United States, (9th Cir., decided Dec. 30, 1966). Hence, the evidence is ample to support the defendant's conviction under Counts I and II, and the defendant's allegation is without merit in fact and without support in law.

#### IV

## THERE WERE NOT ANY GROUNDS FOR A MISTRIAL

Appellant charges that the transcript is replete with mis-statements, conclusions and characterizations by witnesses for the Government regarding defendant's activities, and that a motion for mistrial should have been granted. However, the only specific example cited in defendant's brief refers to Page 35 of the transcript, where King County Deputy



Sheriff Gordon, the undercover agent, testified that his cover story when first meeting Ealey was that he was inexperienced and had received complaints about previous narcotics. It is impossible to visualized how this testimoney would have harmed the appellant's defense, especially in view of the fact that the Court instructed the jury to disregard the statement referring to previous narcotics (TR 35-36). As stated in Glasser v. United States, 315 U.S. 60, 83

We must guard against the magnification on appeal of instances which were of little importance in their setting.

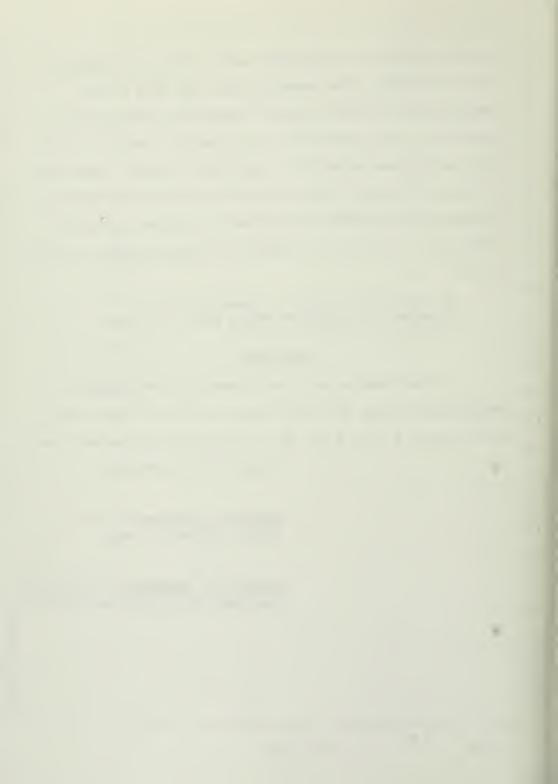
## CONCLUSION

For the reasons set forth above, the Government respectfully urges that the conviction by the trial court as to Counts I, II, V and VI of the Indictment be sustained.

Respectfully submitted,

EUGENE G. CUSHING United States Attorney

MICHAEL J. SWOFFORD Assistant United States Attorney



1 I certify that, in connection with the preparation of 2 this brief, I have examined Rules 18 and 19 of the United 3 States Court of Appeals for the Ninth Circuit, and that, in 4 my opinion, the foregoing brief is in full compliance with 5 these rules. 6 7 MICHAEL J. SWOFFORD 8 Assistant United States Attorney I hereby certify that a copy of the aforesaid Brief for 12 Appellee was mailed this date to: Mr. O. W. Goakey Suite 214, First National Bank Bldg. Klamath Falls, Oregon Colley and McGhee 1617 - 10th Street Sacramento, California Attorneys for Appellant DATED at Seattle, Washington this day of May, 1967. MICHAEL J. SWOFFORD Assistant United States Attorney

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